STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of XAVIER PENNINGTON, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

TAWANA MARSH,

Respondent-Appellant.

UNPUBLISHED
July 25, 2006

No. 266436
Ionia Circuit Court
Family Division
LC No. 04-000003-NA

In the Matter of KYLEIGH SMITH, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

TAWANA MARSH,

Respondent-Appellant.

No. 266437
Ionia Circuit Court
Family Division
LC No. 05-000076-NA

Before: Talbot, P.J., and Owens and Murray, JJ.

MURRAY, J. (*dissenting*).

It is never an easy task determining that a well-respected jurist, especially one who has indicated that he can impartially decide the case, cannot do so because the court rules specify that such a situation constitutes a ground for recusal. Nevertheless, in my opinion the unrebutted

evidence in this case created a situation prohibited by MCR 2.003(B)(3). Therefore, and even though I have no reason to question the actual impartially of the trial court, I reluctantly dissent.[1]

Our court rules set forth certain situations which, if they exist, are *deemed* to constitute a basis for judicial disqualification. *Cain v Dept of Corrections*, 451 Mich 470, 494; 548 NW2d 210 (1996) ("The court rule sets forth a list of situations that are deemed to be the equivalent of an inability to hear a case impartially.") Relevant to this case is MCR 2.003(B)(3), which provides that a judge is to be disqualified when "[t]he judge has been consulted . . . as an attorney in the matter in controversy." Under the plain language of this rule, when a judge has been consulted as an attorney on the case before the court, the judge is deemed to be unable to impartially decide the case. *Cain*, *supra.* See, also, *Armstrong v Ann Arbor*, 58 Mich App 359, 368; 227 NW2d 343 (1975) (recognizing under analogous prior rule that trial judge, who had worked on the case as an assistant city attorney before it was filed, should have recused himself as judge, but parties consented to his remaining on the case).

Here, the letter from Chadwick specified that while he was in the firm with the trial judge, he consulted with him "in detail in preparation of a possible jury trial." Although the trial judge indicated he could only remember the child's name, he did not refute that such pretrial consultation had occurred. Therefore, this conduct falls squarely within that which is deemed to preclude impartiality, MCR 2.003(B)(3), and the trial court abused its discretion in denying the motion to disqualify.

/s/ Christopher M. Murray

[1] I reluctantly dissent because in reviewing the record, I believe the trial court made the correct decision in terminating plaintiff's parental rights. However, I can find no case law indicating this issue is subject to a harmless error analysis.